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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 0 8 2010

LIN 07 190 53215

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that in tax year 2005, the petitioner has not established its ability to pay the proffered wage in addition to paying the wages of multiple beneficiaries for whom the petitioner filed I-140 petitions.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

As set forth in the director's April 10, 2007 denial, the issue in this case is whether or not the petitioner has demonstrated its ability to pay the proffered wages of multiple beneficiaries, including the beneficiary of the instant petition, for whom the petitioner has filed employment-based visa petitions. The AAO will also reexamine whether the beneficiary is qualified to perform the duties of the proffered position.[2]

The Petitioner's Ability to Pay the Proffered Wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[2] The director in an RFE dated June 26, 2007 noted that the beneficiary's diploma from Oklahoma City University (OCU) submitted with the I-140 petition indicated his Master of Science degree was conferred on December 15, 2006, a date after the priority date of March 18, 2005. In response, the petitioner submitted a letter from the OCU registrar's office that stated the beneficiary completed his course requirements for the Master of Science degree in June 2001. The director did not further address this issue in his decision. The AAO will examine this issue more fully further in these proceedings.

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 18, 2005. The proffered wage as stated on the Form ETA 750 is $74,000 per year. The Form ETA 750 states that the position requires six months of work experience in the proffered position, or in the related occupation of project lead/analyst.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of three million dollars, a net annual income of $100,000, and to currently employ 60 workers. On the Form ETA 750B, signed by the beneficiary on March 10, 2005, the beneficiary claimed to have worked for the petitioner since July 2002.

On appeal, counsel identifies two lines of credit, one with Wachovia Bank, with a limit of $150,000, and the second with BB&T, with a limit of $50,000, as an additional source from which to pay the proffered wage. Counsel submits letters from both banks to establish the lines of credit. In the letter from [redacted] Ms. [redacted] states that the petitioner also maintains a checking account and the current average twelve month collected balance is $102,000. Counsel does

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

not provide any further evidence to corroborate this fact. Counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612(Reg. Com. 1967) and states that an employer's reasonable and realistic expectation of a continued increased in business and increasing profits can establish an ability to pay the proffered wage. Counsel also cites an unpublished AAO decision and states that ability to pay can be established where an employer, despite showing a loss or moderate profit for tax purposes has kept sufficient liquid assets on hand, and copies of the petitioner's monthly bank account statements can demonstrate this fact. Counsel also cites to *Masonry Masters, Inc. v. Thornburgh* 742 F. Supp. 682 (D.D.C. 1990) to suggest that the AAO needs to take into account that the beneficiary will contribute to income. Counsel asserts that the petitioner is a profitable enterprise.

The AAO notes that the record does not contain copies of the BB&T checking account referenced by counsel on appeal. Thus, counsel's reference to the petitioner's checking account is moot. Further, counsel's reliance on bank account statements is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," counsel's assertions in this case are not persuasive that the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

With regard to counsel's reference to *Masonry Masters*, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's continuing employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[4] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a software engineer will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment Terms*, 45 (1998).

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[4] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position.

Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

USCIS records indicate that the petitioner has filed 352 petitions, both I-129 and I-140 petitions, since the petitioner's establishment in 1997. In tax year 2007 alone, the petitioner filed a combined 97 I-140 and I-129 petitions. The petitioner would need to demonstrate its ability to pay the proffered wages for each I-140 beneficiary from the March 18, 2005 priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted W-2 Forms for the beneficiary's wages in 2005 and 2006, and paystubs to establish his weekly wages for part of 2007. The beneficiary's 2005 and 2006 wages are $50,000 and $60,000 in 2006, both sums less than the proffered wage of $74,000. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax years 2005 and 2006, namely, $24,000 in 2005 and $14,000 in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 18, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return could have been available. The petitioner did not submit this tax return on appeal. The AAO thus can only examine the petitioner's income tax return for 2005 and 2006. The petitioner's tax returns demonstrate its net income for 2005 and 2006 as shown in the table below.

- In 2005, the Form 1120 stated net income of $64,159.
- In 2006, the Form 1120 stated net income of $43,682

Thus, the petitioner has sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage in both years. However, as stated by the director, the petitioner filed multiple petitions during the relevant period of time in question in the instant matter, and has not established its ability to pay the proffered wage for each filing.

In his RFE, the director requested that the petitioner submit a list of all I-140 petitions filed by the petitioner with priority dates of 2003 through 2006, including proffered wages for each petition. The petitioner submitted a list of fourteen individuals with priority dates ranging from 2003 to 2006. The record is not clear as to whether these individuals are still pending approval. [5] The petitioner did not provide any evidence regarding pending or approved I-129 petitions and the stated prevailing wages for these petitions. The petitioner submitted six W-2 Forms for tax year 2005 and fourteen W-2 Forms for tax year 2006. Given the unclear status of the fourteen individuals listed on the petitioner's documentation, and the much larger number of additional petitions indicated by the USCIS records, the petitioner has failed to establish that it can pay the difference between the actual wages established by the petitioner's W-2 records and the proffered wages in 2005 or 2006 for the instant petition, or the full prevailing wages for all pending petitions

[5] Based on USCIS computer records, at least two of these petitions were approved by the Texas Service Center and were no longer pending as of the director's RFE dated June 26, 2007. (SRC 0503752161 and SRC 06 195 51794.)

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 and 2006, as shown in the table below.

- In 2005, the Form 1120 stated net current assets of $168,387.
- In 2006, the Form 1120 stated net current assets of $205,460.

Again, the petitioner has established that it had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage; however, the record does not establish that the petitioner could have paid the differences in wages for all pending I-140 petitions in 2005, based on the lack of W-2 Forms for 2005. Further, the petitioner has not established that it could pay the wages or difference between actual wages and proffered wage for all its I-140 beneficiaries as well as the prevailing wages of its I-129 beneficiaries. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel's assertions on appeal with regard to lines of credit cannot be concluded to outweigh the fact that the record contains no financial documentation to establish that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the only information with regard to the petitioner's business operations is found on the I-140 petition. This document indicates the petitioner's current number of workers, and current level of gross and net annual income. The petitioner's tax return for 2006 indicates that the petitioner doubled its wages to employees. This information is not sufficient to establish the totality of the petitioner's circumstances throughout the relevant period of time. Thus, even considering the totality of the petitioner's circumstances, it cannot be concluded that the petitioner has established that it had the continuing ability to pay the proffered wage for both the beneficiary and the other beneficiaries of remaining pending I-140 or I-129 petitions in 2005. Thus, the AAO affirms the director's decision with regard to the petitioner's ability to pay the proffered wage.

The AAO will now address the issue of the beneficiary's qualifications for the proffered position.

Beneficiary's Qualifications for the Proffered Position

As previously stated, in pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or

professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

With the I-140 petition, the petitioner submitted the beneficiary's diploma from Oklahoma City University that stated the beneficiary had had the degree of Master of Science conferred on him as of December 15, 2006. In his RFE, the director requested further evidence as to the beneficiary's specific field of study for his graduate studies and noted that the diploma was conferred after the March 18, 2005 priority date. In response the petitioner submitted a letter dated July 19, 2007 from [redacted], Oklahoma City University. [redacted] states that the beneficiary successfully completed all the requirements for a Master of Science degree with a concentration in database systems in June 2001. The petitioner also submitted a letter dated July 16, 2007 from [redacted] Oklahoma City University, that states the beneficiary was enrolled as a full-time student since the Fall 1999 semester and that he completed a Master of Science in Computer Science degree program in the Summer I-2001 session. The director in his decision determined that the petitioner had established that the beneficiary was qualified to perform the duties of the proffered position, based on his U. S. Master's degree in Science.

However for the classification of advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of

"an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Compare* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The record contains evidence that the beneficiary was awarded his Master's degree in computer science on December 15, 2006, a date after the March 18, 2005 priority date.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Regarding the minimum level of education and experience required for the proffered position of software engineer in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Grade School X
High School X
College: X

College Degree Required: M.S. or equiv.
Major Field of Study: C/S or Eng'g
Experience: 6 months in the proffered job or six months in the related occupation of project lead/analyst

Block 15: Experience and proficiency using PeopleSoft 8.4, SQR , P.S. Internet Architecture PeopleCode essential.

The beneficiary indicated that he studied electrical electronics at Kaktiya University, India, studying from July 1995 to May 1999 and receiving a "BE" degree. He also indicated that he had received a Master of Science (MS) from Oklahoma City University in computer science, studying from August 1999 to June 2001.

Based on the beneficiary's diploma from Oklahoma City University, the beneficiary does have a United States Master's of Science degree. His transcript further establishes his field of studies as computer science. However, the beneficiary's diploma also establishes that the actual conferring of the degree occurred after the March 18, 2005 priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As previously stated, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study."

The AAO notes that the petitioner indicated "MS or equiv" in Section 14, Part A of the ETA Form 750. Although neither the petitioner nor the director commented on this term in these proceedings, the equivalent to a Master's degree in the relevant field of study is a baccalaureate degree in the same degree with five years of progressive work experience. While the record reflects that the beneficiary may have a four-year Indian baccalaureate degree (BE), the ETA Form 750, Part B does not indicate any further work experience beyond the beneficiary's six months employment with Strategic Resources International, Hazlet, New Jersey, from December 3, 2001 to June 30, 2002.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.